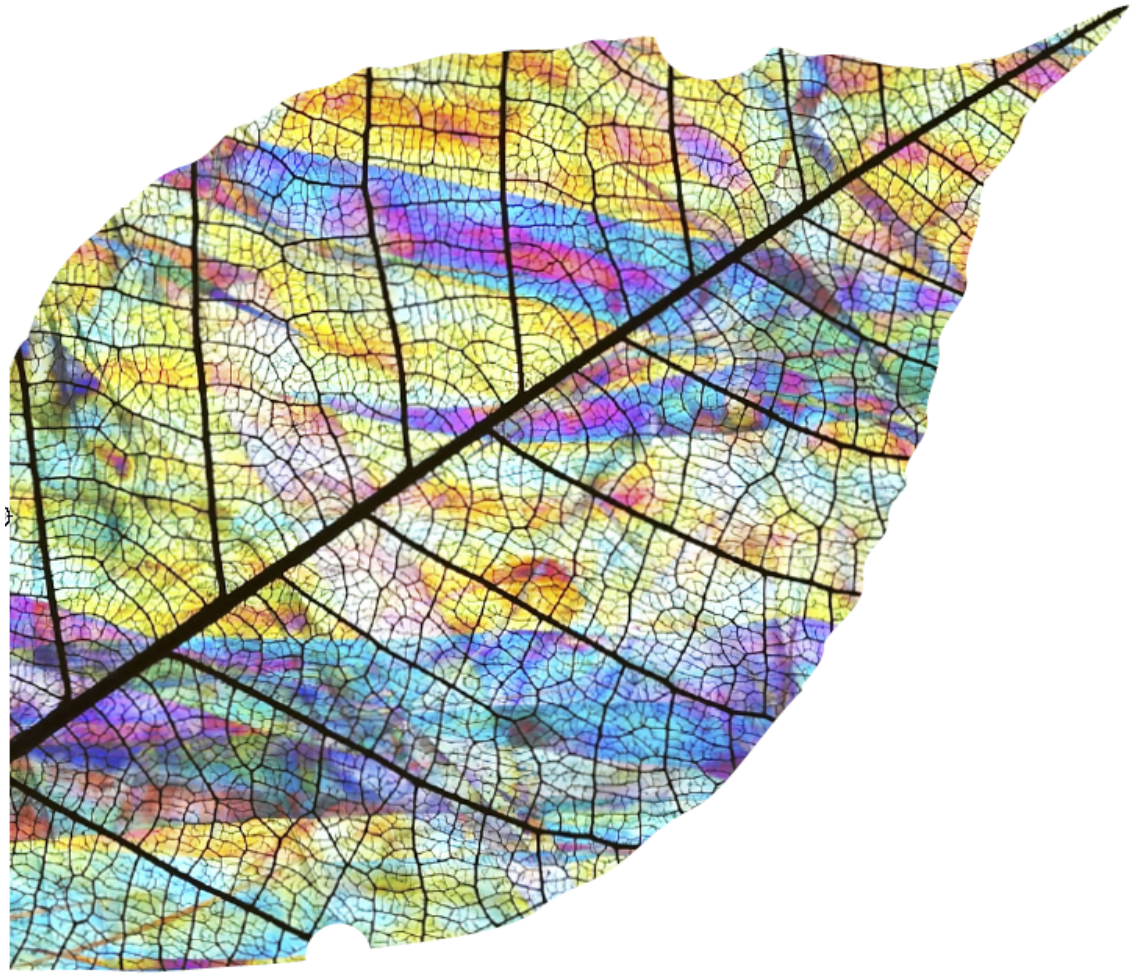
World Universities Comparative Law Project
Legal rating of the United States of America

carried out by students at Harvard University

A production of the Allen & Overy Global Law Intelligence Unit



February, 2015

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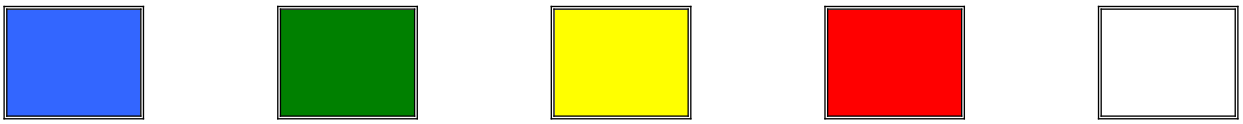


Produced by the Allen & Overy Global Law Intelligence Unit

World Universities Comparative Law Project

The World Universities Comparative Law Project is a set of legal ratings of selected jurisdictions in the world carried out by students at leading universities in the relevant jurisdictions. This legal rating of the United States of America was carried out by students at Harvard University.

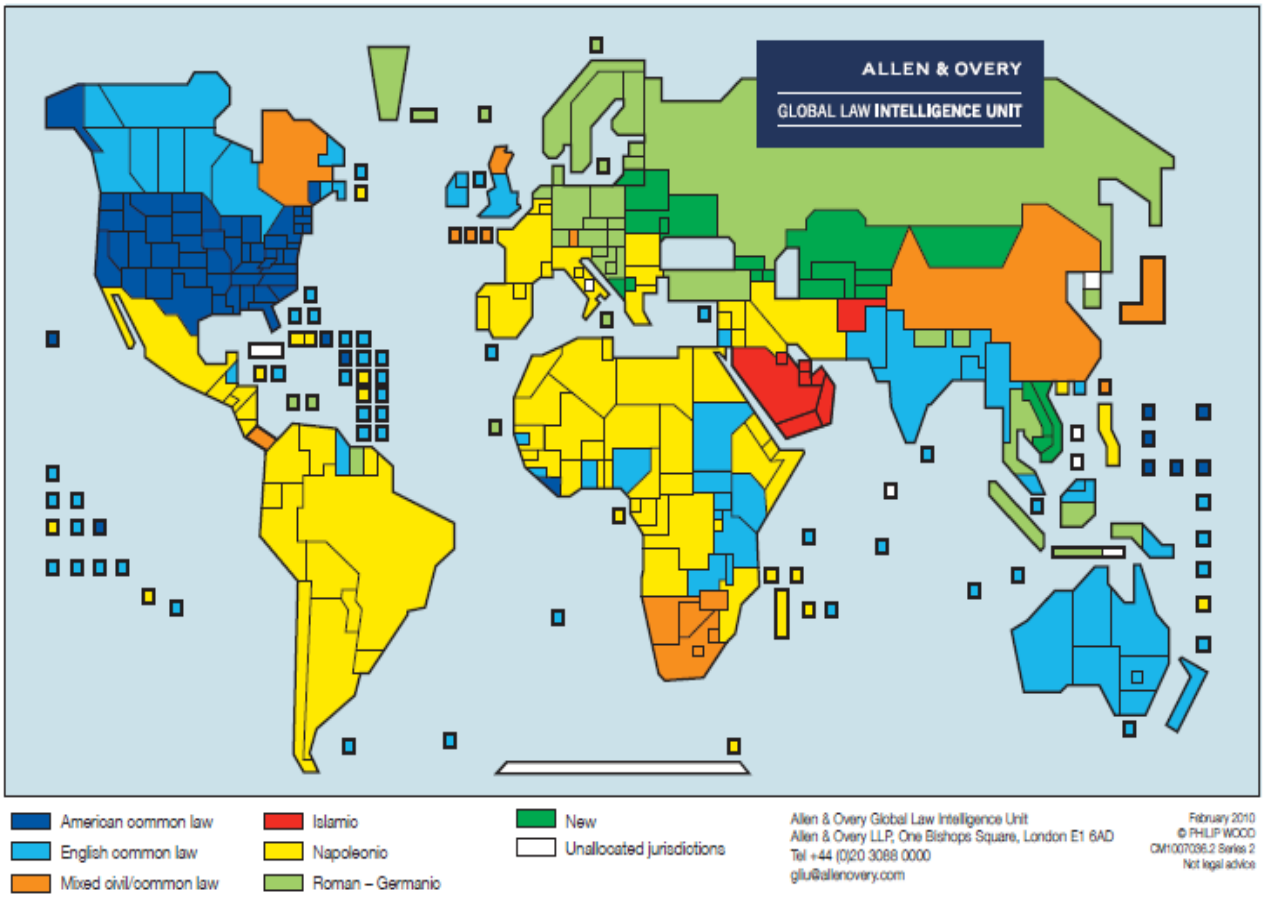
The member of the Faculty of Law at Harvard University who assisted the students was:

Professor Hal S. Scott

The Allen & Overy Global Law Intelligence Unit produced this survey and is most grateful to the above for the work they did in bringing the survey to fruition.

All of those involved congratulate the students who carried out the work.

Families of law



Foreword

It is with great pleasure that I present the legal risk rating of the United States of America, which was completed by students at the Harvard Law School. Harvard Law School was established in 1817 and is the oldest continuously operating law school in the United States. Our students and professors hail from every corner of the world – the lively and creative debate they bring to projects like these is in many ways our greatest asset.

I commend Professor Philip Wood, the head of Allen & Overy's Global Law Intelligence Unit, for crafting this pertinent survey, which not only spans the breadth of American corporate and transactional law but also provides our students an opportunity to engage with their peers from around the globe. Harvard Law School has historically been committed to fostering international cooperation and understanding. In this spirit of international friendship, the World Universities Comparative Law Project brings together students from the world's different legal jurisdictions to think critically about how law impacts the legal risk faced by individuals and companies who do business in these jurisdictions. In an increasingly globalized world, such efforts are more important than ever.

While we aspire to provide useful insights through this survey, we also hope that the World Universities Comparative Law Project contributes to a vibrant community of future legal practitioners and scholars around the world.

Sincerely,

Hal S. Scott
Nomura Professor and Director of the Program on International Financial Systems, Harvard Law School;
Director of the Committee on Capital Markets Regulation

Description of the legal rating method

Introduction

This paper assesses aspects of the law in the United States of America with a view to rating the law in the relevant areas. The survey is concerned primarily with wholesale financial and corporate law and transactions, not with retail law.

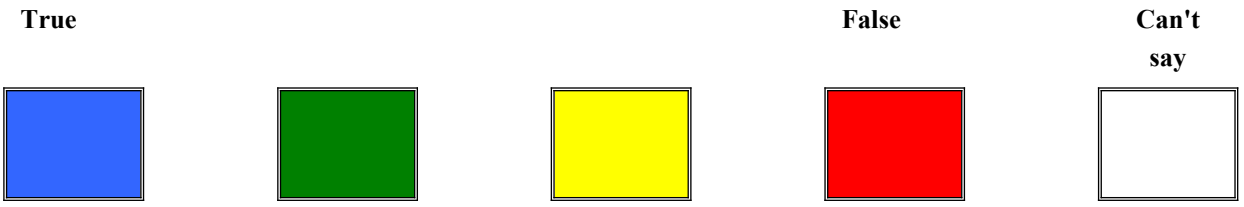
Legal risk has increased globally because of the enormous growth of law; because of its intensity; because many businesses are global but the law is national; because nearly all countries are now part of the world economy; and because the law is considered to play a very significant role in the fortunes of our societies. Liabilities can be very large and reputational losses severe.

The survey was carried out by students at Harvard University. The survey was designed by the Allen & Overy Global Law Intelligence Unit.

The students were requested to express their views freely and in their own way. The views expressed are their views, not necessarily those of Harvard University, the members of the Practitioner Expert Panel or the Global Law Intelligence Unit, the members of Allen & Overy.

Methodology

The survey uses colour-coding as follows:



Blue generally means that the law does not intervene and the parties are free, ie the law is liberal and open.

Red generally means that there is intense legal intervention, usually in the form of a prohibition.

Green and **yellow** are in-between.

The purpose of this colour-coding is to synthesise and distil information in a dramatic way, rather than a legal treatise. The colours correspond to a rating of 1, 2, 3 or 4, or A, B, C or D.

The cross in the relevant box signifies the view of the students carrying out this assessment of the position of the United States of America. This is followed by a brief comment, e.g. pointing out qualifications or expanding the point. These comments were written by the students.

The colour-coding does not usually express a view about what is good or bad. Whether the law should intervene in a particular arena is a matter of opinion. The scale is from low legal intervention to intense legal intervention or control. This is not a policy or value judgment as to whether or not the law should or should not intervene. Jurisdictions often disagree on whether the law should intervene and how much. So one of the main purposes of this survey is to endeavour to identify some of the points of difference so as to promote fruitful debate.

Black letter law and how it is applied

This survey measures two aspects of law. The first is black letter law, ie what the law says or the written law or law in the books.

The second measure is how the law is applied in practice, regardless of what it says. Thus, the law of Congo Kinshasa and Belgium has similar roots but its application is different.

Although there is a continuum, these two measures have to be kept separate. Otherwise we may end up with just a blur or noise or some bland platitude, eg that the law depends upon GDP per capita.

In fact, only the last two questions deal with legal infrastructure and how the law is applied. All of the others deal with the written law, without regard to enforcement or application.

Key indicators

The survey uses key indicators to carry out the assessment. It is not feasible to measure all the laws or even a tiny fraction of them. The law of most jurisdictions is vast and fills whole libraries.

The key indicators are intended to be symptomatic or symbolic of the general approach of the jurisdiction. To qualify as useful, the indicator must usually be (1) important in economic terms, (2) representative or symbolic and (3) measurable. In addition, the indicators seek to measure topics where jurisdictions are in conflict. There is less need for measuring topics where everybody agrees.

An important question is whether this method is useful or not, and, if it is, whether the indicators are relevant.

Legal families of the world

Most of the 320 jurisdictions in the world, spread just under 200 sovereign states, can be grouped into legal families. The three most important of these are: (1) the common law group, originally championed by England; (2) the Napoleonic group, originally championed by France; and (3) the Roman-Germanic group, originally championed by Germany, with major contributions from other countries.

The balance of jurisdictions is made up of mixed, Islamic, new and unallocated jurisdictions.

Many aspects of private law are determined primarily by the family group, but this is not true of regulatory or economic law.

Excluded topics

This survey does not cover:

- transactions involving individuals
- personal law, such as family law or succession
- competition or antitrust law
- intellectual property
- auditing
- general taxation
- macroeconomic conditions, such as inflation, government debt, credit rating or savings rates
- human development, such as education, public health or life expectancy
- infrastructure, such as roads, ports, water supply, electricity supply
- personal security, such as crime rates, civil disorder or terrorism.

Banking and finance

Introduction

Banks and bondholders (typically also banks, but also insurance companies, pension funds and mutual funds) provide credit or capital. Their main risk is the insolvency of the debtor and therefore the key indicators intended to measure whether the law supports those habitual creditors or debtors, such as large corporations as borrowers, when it matters, ie on bankruptcy. This is when commercial law is at its most ruthless in deciding who survives and who drowns.

This debtor or creditor decision is implemented mainly through the bankruptcy ladder of priorities. A feature of common law systems is the presence of super-priority creditors who are paid before anyone else - creditors with a set-off or a security interest and beneficiaries under a trust. For example, if a bank has universal security over all the assets of a company, the bank is paid before all other creditors, including employees and trade creditors. This regime therefore protects significant creditors who such as banks.

Jurisdictions based on the English common law model give super-priority to all three claimants. Traditional Napoleonic jurisdictions typically do not allow insolvency set-off, have narrower security interests and do not recognise the trust. Their bankruptcy ladder favours greater equality of creditors. Most traditional Roman-Germanic jurisdictions are in-between. They allow insolvency set-off and have quite wide security but most do not recognise the trust. There are wide exceptions to these generalisations.

Insolvency set-off

Generally If set-off of mutual debts is allowed on insolvency, the creditor is paid. If it is not allowed, then effectively the creditor is not paid. Very large amounts are involved in markets for foreign exchange, securities, derivatives, commodities and the like, so that the question of whether exposures should be gross or net is a matter of policy as to who the law should protect.

Q1 In the United States of America, creditors can set off mutual debts on the insolvency of a debtor if they are incurred before notice of the insolvency.

True		False	Can't say
✓			

Comment:

Section 553(a) of Chapter 7 of the Title 11 of the United States Code (the "Bankruptcy Code" or the "Code"), a federal law, preserves "any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case," with some limited exceptions. Courts have strictly construed the mutuality requirements of the Code, requiring it for both contractual and common law set-off after insolvency. Cross-affiliates setoff, for example, is unenforceable in bankruptcy, even if protected by contractual rights outside of the bankruptcy context.

Security interests

Generally Security interests give priority to the creditor with security - typically banks - who are the main providers of credit in most countries.

In traditional common law jurisdictions, a company can create universal security over all its present and future assets to secure all present and future debt owed to a bank. Once registered, the security is valid against all creditors, except that the floating collateral ranks after preferred creditors - typically wages and taxes. The security can be granted to a trustee for creditors. On a default there are no mandatory grace periods and the creditor can enforce out-of-court by appointing a receiver (a type of possessory manager) or by private sale. But in some common law jurisdictions there are freezes on enforcement in the event of a judicial rescue of the debtor. Also, in some of these jurisdictions there are stamp duties.

On the other hand, in many traditional Napoleonic jurisdictions, universal security is not possible, neither is security for all future debt. There is no trustee to hold the security. On enforcement, there are grace periods and no receiver. Sale is through the court and a public auction. Preferential creditors rank ahead. Some countries have a freeze on enforcement under a judicial rescue statute.

The main policy issue is therefore whether security should be encouraged or whether the law should intervene to impose greater equality.

The main tests are (1) scope of eligible assets, (2) debt secured, (3) trustee, (4) priority over preferred creditors, (5) private enforcement and receiver, (6) no rescue freezes and (7) low costs.

Q2 In the United States of America**,** the law offers a security interest which is highly protective of the secured creditor.

True			False	Can't say
✓				

Comment:

U.S. law protecting secured creditors draws from the U.S. Bankruptcy Code, the Federal Deposit Insurance Act ("FDIA"), and the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), and the Orderly Liquidation Authority of its Title II in particular. U.S. Bankruptcy code generally gives secured creditors priority for the value of their secured interest. The Federal Deposit Insurance Corporation, through the FDIA's resolution process, and the OLA also uphold the contractual rights of secured creditors. Additionally, security interests are governed in all of the states by the harmonized Article 9 of the Uniform Commercial Code.

A relatively recent development in this field of law was the Dodd-Frank Act's call on the newly created Financial Stability Oversight Council ("FSOC") to study whether secured creditor haircuts – that is, treating secured creditors as unsecured – would promote financial stability in resolution proceedings. In its July 18, 2011 study, the FSOC concluded that secured credit haircuts were not necessary in light of the new resolution authority and other protection provided by the Dodd-Frank Act.

Universal trusts

Under a trust, one person, called the trustee, holds title to the assets of another person, called the beneficiary, on terms that, if the trustee becomes insolvent, the assets go to the beneficiary and are not used to pay the trustee's private creditors. The assets are immune and therefore taken away from the debtor-trustee's bankrupt estate.

The main examples of trusts are custodianship of securities, pension funds, securities settlement systems and trustees of security for bondholders and syndicate banks. The amounts involved are enormous.

All jurisdictions have an effective trust of goods (called bailment or deposit). The common law group has a universal trust for all other assets (land and intangible property). Most members of the civil code group do not have a universal trust, subject to wide exceptions, especially for custodianship of securities. A few countries in this group have a universal trust by statute, e.g. France and China.

Q3 The United States of America has a universal trust for all assets.

True			False	Can't say
✓				

Comment:

U.S. trust law is governed by state law and thus will vary state by state but all states have a trust for all assets. However, the Uniform Trust Code (drafted in 2000) is an attempt to harmonize state laws by codifying the common law of trusts, and has been adopted by several states.

Other indicators

Other bankruptcy indicators not measured here include freezes on the termination of contracts, fraudulent preferences, the priority of rescue new money, the presence and intensity of corporate rescue proceedings and recognition of foreign insolvencies. Director liability for deepening the insolvency is dealt with below.

Other financial law topics not covered in this survey include the regulatory regime, especially capital, liquidity, authorisation of financial business, conduct of business, control of prospectuses, control of market abuse and frauds, such as insider dealing, and the insolvency regime for banks. Financial regulation is a very large field.

Corporations

Introduction

Financial law involves competition between debtors and creditors so that jurisdictions can be positioned on a straight line. Corporate law however involves three main competitors: (1) shareholders, (2) creditors and (3) managers - a triangle. If the key indicators show that a jurisdiction strongly favours one or other of the parties at the points of the triangle, whether creditors, shareholders or management, then one can begin to build up a picture of the choices which the jurisdiction habitually makes in resolving the conflicting interests of the parties.

For example, a very tough prohibition on financial assistance (which is protective of creditors against shareholders) tends also to support an attitude to other principles of the maintenance of capital or to support the proposition that mergers by fusion are difficult (because they can prejudice creditors). This would be true of the English regime in 1948. Similarly, a view which easily imposes personal liability on directors for deepening an insolvency might also show a legal approach which is not supportive of the veil of incorporation in other areas, eg shareholder liability and substantive consolidation on insolvency.

The two extreme corporate law models are the Delaware model and the traditional English model, exemplified by the English Companies Act 1948 (now superseded). Napoleonic and Roman-Germanic models are in-between to varying degrees.

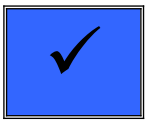
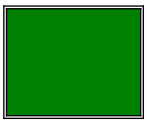
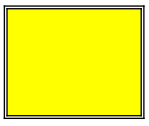
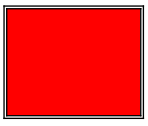
The Delaware regime is highly protective of management in the key areas. The traditional English regime favours creditors on most of the key contests and, where creditor interests are not involved, it tends to favour shareholders as opposed to managers.

Director liability for deepening an insolvency

Generally If the law imposes personal liability on directors for deepening an insolvency, eg carrying on business and incurring debts where there is no reasonable prospect of paying them, then the regime is hostile to the interests of management. The legal risks of management are increased.

There are basically four regimes internationally: (1) directors are hardly ever liable for deepening the insolvency, eg Delaware and most US jurisdictions, plus some traditional English jurisdictions which only punish fraudulent trading; (2) directors are liable for serious negligence (England, Singapore, Australia, Ireland); (3) directors are liable for mere business misjudgements deepening the insolvency (France); and (4) directors are liable if they fail to file for an insolvency proceeding after the company becomes insolvent (France, Germany and others).

Q4 In the United States of America the law rarely imposes personal liability on directors for deepening the insolvency and there is no rule that the directors must file for insolvency when the company is insolvent.

True			False	Can't say
				

Comment:

Simply put, it is very difficult to impose director liability in the Delaware regime, which is used by the vast majority of corporations in the United States. Generally, directors in a Delaware corporation are said to owe both a duty of care and a duty of loyalty toward the corporation and its shareholders.

Direct limits on liability via the corporate charter, director insurance, and indemnification by the corporation to the director may serve to reduce or eliminate director liability for breach of their duties. First, so long as directors are reasonably informed and not clearly self-interested, they will be protected from duty of care liability by a deferential judicial review standard known as the “business judgment rule.”

Further, Delaware's Section 102(b)(7) allows corporations to eliminate or limit the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty of care as a director. A large majority of Delaware corporations eliminate or limit duty of care violations through a Section 102(b)(7) provision. Importantly, a Section 102(b)(7) provision does not limit liability for breach of duty of loyalty, for acts not conducted in good faith, and certain other misconduct. The policy rationale behind such statute frees up directors to take business risks without worrying about negligence lawsuits.

Financial assistance to buy own shares

Generally Many jurisdictions prohibit a company from giving financial assistance to buy its own shares. The typical example would be where a bidder finances the acquisition of a target company by a loan and after the takeover arranges for the target to guarantee the loan and charge its assets to secure the guarantee. The commercial effect is similar to the repayment of the share capital of the target before its creditors are paid. Shareholders should be subordinated to creditors.

The prohibition therefore favours creditors against shareholders of the target.

The Delaware regime does not prohibit financial assistance. The traditional English regime has a wide prohibition (not England any more). Most Roman-Germanic regimes are against it, with Napoleonic regimes hesitant. The EU has a prohibition against financial assistance by public companies. Some countries allow financial assistance by private companies if solvency is established.

A contravening transaction is usually a criminal offence and void.

Q5 the United States of America permits a company to grant financial assistance for the purchase of its own shares.

True			False	Can't say
✓				

Comment:

In the United States and the state of Delaware in particular, a company can repurchase its own shares in several different ways, including by purchasing its shares in the market, by issuing tender offers, and by contractual repurchasing from other holders. Title 8, Sections 160 of the General Corporation Law of the State of Delaware allow corporations to purchase their own stock: "Every corporation may purchase, redeem, receive, take or otherwise acquire, own and hold, sell, lend, exchange, transfer or otherwise dispose of, pledge, use and otherwise deal in and with its own shares."

Some limitations and restrictions to corporation's ability to buy their own shares under Section 160 include a prohibition on transactions that impair a corporation's capital. The policy rationale behind allowing a company to purchase its own shares is that it can best gauge when its shares are undervalued, and thus gain value for its shareholders by buying its own shares.

Public takeover regime

Generally A public takeover regime which is free and open tends to favour managers who can guard against takeovers by poison pills and the like and who have relative freedom to acquire other companies. An example is the Delaware regime. A restrictive regime on the lines of the British system tends to favour shareholders.

The chief features of a restrictive regime are: (1) the bidder must make a mandatory bid in cash when a threshold of shares in the target is reached, eg 30%; (2) the bidder must pay the same price to all shareholders (sharing the control premium); (3) no partial bids (getting control on the cheap); (4) proof of certain funds to implement the offer; (5) compulsory acquisition of dissenting minorities (squeeze-out); (6) fixed timetable; (7) no ability of the managers to frustrate a bid by poison pills without shareholder approval; and (8) control of the content of circulars, especially forecasts.

Q6 Apart from exchange controls and restrictions on foreign direct investments, the public takeover regime in the United States of America is open and has few restrictions.

True			False	Can't say
✓				

Comment:

Tender offers, or offers to shareholders of a public corporation to purchase their shares in a takeover bid, are allowed and have few restrictions in the United States. The policy rationale behind a takeover regime with few restrictions is that takeovers enhance corporate governance. The mere threat of a takeover may incentivize management to perform well. If a takeover occurs, the bidder may bring in better management, thus leading to better performance.

Tender offers in the United States are regulated by the U.S. Securities and Exchange Commission. Some restrictions to takeovers resulted from the 1968 changes to the Securities Exchange Act of 1934, also referred to the Williams Act. The Williams Act requires an "early warning" system to disclose any one person, or group acting together, who has acquired beneficial ownership of more than 5% of any class of equity securities. The United States, however, allows managers to defend against a hostile takeover, including through the use of a "poison pill." A poison pill effectively dilutes a bidder's stock position, thus thwarting the hostile bid. Management defences to hostile takeovers are overseen by the Delaware state courts.

Other indicators

Other important indicators are corporate governance (difficult to measure), free ability to merge companies by fusion, the one-share-one-vote rule, and, to a lesser extent, minority protections. Other indicators relate to quick and cheap incorporation, the *ultra vires* rule, maintenance of capital, no par value shares, shareholder liability, substantive consolidation on insolvency and disclosure. These are not measured here.

Commercial contracts

Introduction

Contract is at the heart of commercial life, and is everywhere. In fact, the main tenets of contract law across the main families of jurisdictions are consistent - it is in the fields of insolvency and property law where the main differences emerge. It is true that there are contract differences, for example, between writing requirements, open offers, the time of acceptance and specific performance, but often these differences are of lesser significance in practice in the business field.

The key indicators the survey chooses all tend to symbolise whether the approach of the jurisdiction to contract is hard or soft. If the approach is hard, then the jurisdiction tends to support predictability in business contracts so that certainty and freedom of contract are valued more than mitigating the risk of occasionally abusive behaviour and unfair results, especially for weaker parties. A soft jurisdiction tends to give greater primacy to notions of good faith and the like.

Exclusion of contract formation

Generally Commercial parties often wish to be able to negotiate heads of terms commercially without being bound by a contract. In some jurisdictions, the courts are ready to infer that the parties are bound if the terms are sufficiently clear, even if they have said expressly that they do not intend to be bound.

Q7 In the United States of America, parties are not bound to heads of terms if they expressly state that the terms are "subject to contract" or some such clear phrase.

True			False	Can't say
	✓			

Comment:

Usually in the United States, a letter of intent would be used in this context. If the letter of intent clearly sets forth that it is not intended to be a legally binding contract, then courts will typically not bind the parties. However, if parties confirmed agreement on essential terms, there might be situations where a letter of intent could be interpreted as binding

Termination clauses

Generally Many contracts, especially loan contracts, leases of goods and long-term sales contracts, contain events of default on the occurrence of which one party can terminate the contract. Jurisdictions which uphold freedom of contract and the literal interpretation of contract give effect to these clauses and do not rewrite the contract according to the court's notions of what is fair. Other jurisdictions prefer good faith. We ignore consumer contracts - where there may be consumer protections.

Q8 In the United States of America, a termination clause in a loan or sale of goods contract between sophisticated companies (not individuals) providing for the termination of the contract immediately on certain events is usually upheld, even if the event concerned is relatively trivial.

True			False	Can't say
	✓			

Comment:

Provided that the termination clause is absolutely clear and not unconscionable, it will usually be upheld if both parties are informed and savvy.

Exclusion clauses

Generally Contracting parties often seek to exclude their liability for defective performance of the contract. So the issue is whether these exclusion clauses are generally upheld if they are clear and whether freedom of contract is allowed in this area.

Q9 In the United States of America, exclusions of liability in most commercial contracts between sophisticated companies, such as a sale of goods contract, are generally upheld if they are clear.

True			False	Can't say
	✓			

Comment:

When the parties are sophisticated businesses, courts enforce limitations of liabilities absent clear proof that such limitation is unjust or unreasonable. See M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972).

Other indicators

Other contract indicators not assessed here include writing formalities, open offers, mistake, frustration, damages, penalties, specific performance and whether notice of assignment of the contract to the debtor is mandatory if the assignment is to be valid on the insolvency of the assignor.

Litigation

Introduction

The first three key indicators of governing law, jurisdiction and arbitration tend to show whether the jurisdiction does or does not place a high value on international comity and freedom of contract as opposed to national primacy.

The indicator on class actions tends to show whether or not the jurisdiction's litigation system is orientated towards plaintiffs, especially mass plaintiffs in product liability cases. This indicator may also show the attitude of the jurisdiction to the protection of individual parties as against business parties, both in terms of the incidence of costs and enforcement.

Governing law clauses

Generally Most countries apply a foreign governing law of a contract even if there is no connection between the contract and the jurisdiction. If the courts do not uphold the governing law, the effect is that the contract obligations may be different.

Q10 The American courts will apply an express choice of a foreign law in a loan or sale of goods contract between sophisticated companies, even though the contract has no connection with the foreign jurisdiction, but subject to US public policy and mandatory statutes.

True			False	Can't say
✓				

Comment:

Courts in the United States will generally enforce choice of law clauses selecting foreign law to govern contracts between sophisticated parties. Indeed, such clauses are presumptively valid and will be upheld unless a party seeking to avoid enforcement can show that the clause at issue stemmed from fraud or overreach or would lead to unreasonable and unjust results, unfairly deprive the complaining party of a remedy or its day in court, or contravene a strong public policy. Scherk v. Alberto-Culver Company, 417 U.S. 506 (1974). Only rarely is a foreign choice of law clause found to satisfy one of these exceptions, so, seeking to protect the expectations of the contractual parties, courts uphold most choice of law clauses

Foreign jurisdiction clauses

Generally Many contracts confer jurisdiction, sometimes exclusive, on the courts of a foreign jurisdiction, usually accompanied by a choice of foreign governing law.

Q11 The American courts will generally uphold a clear submission in a loan or sale of goods contract between sophisticated companies to the exclusive jurisdiction of the courts of a foreign country, even if there is no connection between that country and the contract.

True			False	Can't say
✓				

Comment:

International forum selection clauses in contracts between sophisticated parties are presumed valid in the United States. In general, American courts will uphold an international forum selection clause unless the party seeking to avoid enforcement can show either that the clause was included in the contract by fraud or overreaching or that its enforcement would be unreasonable and unjust, strongly conflict with public policy, unfairly deny access to a remedy, or occasion such inconvenience as effectively to deny the party its day in court. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). Notably, neither mere inconvenience nor the absence of bargaining between the parties constitutes grounds for invalidating a forum selection clause. Because a party seeking to avoid enforcement faces such a heavy burden of proof, courts uphold international forum selection clauses in most cases.

Arbitration recognition

Generally Contracting parties, especially in trading and construction contracts, but less so in loan contracts, wish to submit disputes to arbitration, sometimes in a foreign country. The resulting award is often enforceable locally under the New York Arbitration Convention of 1958, to which most countries have adhered.

Q12 In the United States of America, the courts allow sophisticated contracting parties to submit contract disputes to a foreign arbitral tribunal to the exclusion of the American courts.

True			False	Can't say
✓				

Comment:

American courts generally permit sophisticated contracting parties to submit disputes to foreign arbitration. Because courts view foreign arbitration provisions as essential to modern international business transactions, such provisions are presumed enforceable and are governed by the same liberal standards as foreign jurisdiction clauses. Scherk v. Alberto-Culver Company, 417 U.S. 506 (1974). Thus, so long as a foreign

arbitration provision was not obtained through fraud or overreaching and its enforcement would not be unreasonable and unjust, contravene compelling public policy, or deprive a party of a remedy or its day in court, courts will uphold the provision. In practice, so strong is the presumption in favour of enforcing foreign arbitration clauses that the Supreme Court has repeatedly sustained such provisions, even in the face of strong contrary public policy. See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

Class actions

Generally In some countries, such as the United States, a plaintiff can be authorised by the court to sue on behalf of all claimants who are similarly situated. Claimants have to opt out or they are bound.

Q13 In the United States of America, class actions where the class is bound if they do not opt out are generally not allowed.

True			False	Can't say
			✓	

Comment:

Under United States law, class action lawsuits may bind class members who do not opt out of the class. At the federal level, Federal Rule of Civil Procedure 23 governs class certification—the process by which courts authorize the creation of a class. Before a potential class representative can act on behalf of a defined class, a court must certify that the class is sufficiently large and homogeneous and that the representative would suitably advance the interests of the class. The Supreme Court's recent decision in Wal-Mart v. Dukes, 131 S. Ct. 2541 (2011) made class certification harder to achieve by reading Rule 23 to require the putative class to satisfy more exacting commonality standards. If a class meets these standards, however, courts will allow the class representative to act on behalf of the entire class in the litigation. At this point, depending on which provision of Rule 23 is invoked, courts may or may not require that class members be notified and given the opportunity to opt out of the class; members who do not (or cannot) opt out are thereafter bound. At the state level, many jurisdictions have class action rules similar to Rule 23, although some states follow their own unique procedures, while others heavily restrict or disallow class actions altogether.

Other indicators

Other indicators not covered by this survey include contingent costs, loser pays the costs of the winner, prejudgment freezes or arrests, appeals, scope of disclosure (discovery of documents), efficacy of waivers of sovereign immunity and the enforceability of foreign judgments.

Real property

Ownership of land

Generally In most countries, nationals can own land absolutely and are not restricted simply to leases for a limited term or simple rights of occupancy. However, in some jurisdictions, absolute ownership of land is not available to nationals or local corporations. If this is so, then the jurisdiction would be coloured green if

citizens can lease land for a very long term without material restrictions, such as 999 years, and can also mortgage or sell the land or give it away or bequeath it under their wills without official consent because the ownership is a close proximate of absolute ownership. If on the other hand citizens are entitled only to a lease of, say, 70 years or less, or to similar rights of occupancy, and if there are limitations on dealing with the land without official consent, such as mortgaging, selling or bequeathing it, then the jurisdiction would be red.

Q14 In the United States of America, nationals and local corporations are entitled to own land absolutely.

True			False	Can't say
✓				

Comment:

United States property law entitles both natural persons and corporations to nearly absolute ownership over land, subject to a handful of restrictions and contingencies. Under the most common—and most robust—land ownership arrangement, the fee simple absolute, the landowner enjoys the full range of legal rights, including possession and use, sale, lease, and mortgage. Such property ownership is a fundamental right under American law, protected by the fifth and fourteenth amendments to the United States Constitution.

Despite the broad protection afforded to landowners, however, common law, statutes, regulations, and local ordinances may restrict land use to some degree. For example, under Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), local governments are free to enact zoning ordinances that result in significant—yet uncompensated—devaluation of land. Moreover, the government is entitled to take possession of land under its eminent domain power, provided the landowner is compensated and the taking is effected for some public use.

Security of land title and land registers

Generally Many jurisdictions improve the security of title to land by a registration system which, although not necessarily state-guaranteed, has high reliability. An example is the Torrens system developed in Australia and used in many other countries, eg Canada and England.

Most countries in the civil code groups do not have a title register but instead require documents concerning land to be notarised and filed at the registry so that they can be searched. The United States does not generally have title registers for land although there may be mortgage registers. They rely on title registration companies which provide title insurance.

Q15 Most land in the United States of America is registered in a land register which records most major interests in land, eg ownership, mortgages and longer-term leases.

True			False	Can't say
			✓	

Comment:

Only a handful of American states employ land title registers. Most states, by contrast, use county-by-county land recordation systems to collect evidence of title (i.e. deeds and other such documents) attesting to interests, encumbrances, and claims. Thus, only by searching the relevant public records to inspect the chain of title can interested parties draw conclusions about the legal state of a given title at a given time. Because of the uncertainty inherent in this system, title insurance companies—most of which also perform title searches—offer policies to defend purchasers in lawsuits challenging their title or to indemnify policyholders, should a title be found defective.

States record mortgages along with other evidence of title in their land recordation systems. However, most United States mortgages are now registered in a private electronic database called the Mortgage Electronic Registration System (MERS). In the 1990s, several large American banks created MERS Inc. to avoid the public recordation apparatus and streamline mortgage registration nationwide. Today, MERS Inc. acts as the intermediary in most American mortgages: mortgages are publicly registered in the name of MERS Inc., while the MERS database tracks mortgage servicing rights on behalf of the financial institutions actually concerned with the mortgages.

Land development restrictions

Generally Many countries restrict development and the change of use of land and require permits to be obtained for any development or change of use.

Q16 In the United States of America, apart from environmental controls (dealt with later), the control of commercial development and the change of use of land is very light and, where required, permits are quick and cheap to obtain.

True			False	Can't say
	✓			

Comment:

In the United States, land development is restricted by zoning, which allows the government to impose conditions on the private use of real property. Zoning in is generally undertaken by state and local municipal governments; federal lands are not subject to zoning requirements. Local governments can designate different zones for different uses, such as commercial, residential, agricultural, or industrial uses. In addition, local zoning ordinances can set limits on buildings that can be built in a particular area, such as height restrictions. Landowners may apply for a variance, or exception to existing land use regulations; the application process and likelihood of approval varies widely by municipality.

Other indicators

Other indicators not surveyed include transfer costs, stamp duties and lessee protections.

Employment law

Generally The indicator here is whether it is easy or hard to hire and fire employees. The measures include high minimum wages, maximum hours, minimum holidays, maternity rights, equal pay for equal work (non-discrimination) and severance costs.

Q17 In the United States of America, there are few controls on hiring and firing employees or on the terms of employment.

True			False	Can't say
		✓		

Comment:

The U.S. Department of Labor administers and enforces more than 180 federal laws relating to employers and workers, including statutes relating to wage and safety requirements (e.g., the Fair Labor Standards Act, and the Occupational Safety and Health Act, which is administered by the Occupational Safety and Health Administration). In addition, most labor and public safety laws and many environmental laws mandate whistleblower protections for employees who expose violations of the law by their employers.

The Equal Opportunity Employment Commission ("EEOC") is responsible for enforcing statutes regulating non-discrimination in employment, including federal laws that make it illegal to discriminate against a job applicant or an employee based on the person's race, color, religion, sex, national origin, age, disability, or genetic information. It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. While 21 states and the District of Columbia have laws prohibiting workplace discrimination based on sexual orientation, there is no federal law that ensures similar protections yet. The Employment Non-Discrimination Act, which has been proposed but not yet adopted by the U.S. Congress, would ban employers from firing, refusing to hire or discriminating against workers or job applicants based on their sexual orientation or gender ide*n*tity.

Environmental restrictions

Q18 In the United States of America, the rules governing the environment and liability for clean-up are very light and relaxed.

True			False	Can't say
		✓		

Comment:

The Environmental Protection Agency ("EPA") enforces dozens of federal laws concerning the environment, including the Clean Air Act, the Clean Water Act, and the Endangered Species Act. For example, the Clean Air Act is the comprehensive federal law that regulates air emissions from stationary and mobile sources. This law authorizes the EPA to establish National Ambient Air Quality Standards to protect public health and public welfare and to regulate emissions of hazardous air pollutants. In general, violation of federal environmental laws gives rise only to civil liability, resulting in monetary fines or injunctions. Some laws create the possibility of criminal liability for egregious violations, which are enforced by the Office of Enforcement and Compliance Assurance of the EPA.

Openness to foreign business

Generally These indicators measure the degree to which the country is open to foreign businesses. The indicators are quite generic and therefore subjective.

Foreign direct investment

Q19 In the United States of America foreigners may freely own and control local companies outside protected industries, such as media, banks and defence.

True			False	Can't say
	✓			

Comment:

The United States has a generally open foreign investment climate, with statutory limitations on investment in such industries as maritime, aircraft, banking, resources, and power. In addition to these protected industries, foreign investment in the United States is subject to review by the Committee on Foreign Investment in the United States ("CFIUS"), a nine-member committee chaired by the Secretary of the Treasury and composed of other members appointed by the President, all of whom represent the heads of major departments and agencies within the federal executive branch. CFIUS was established in 1975 and is

tasked with overseeing the national security implications of foreign investments in the U.S. economy. In 1988, Congress approved the Exon-Florio provision, which grants the President the authority to block proposed or pending mergers, acquisitions, or takeovers.

Today, CFIUS is required to investigate proposed mergers, acquisitions, and takeovers any time the acquirer is controlled by or acting on behalf of a foreign government, or the transaction may impair national security. National security includes issues relating to 'homeland security,' including issues relating to 'critical infrastructure,' and 'critical technologies.' Foreign investment transactions that are not subject to CFIUS review are those that are undertaken "solely for the purpose of investment," or where the foreign investor has "no intention of determining or directing the basic business decisions of the issuer." The U.S. President is the only officer with the authority to suspend or prohibit mergers, acquisitions, and takeovers.

Exchange controls

Q20 In the United States of America, there are no exchange controls. Businesses may therefore have foreign bank deposit accounts in foreign currency, borrow in foreign currency and repatriate profits to foreign shareholders in foreign currency.

True			False	Can't say
✓				

Comment:

There are no foreign exchange controls in the United States. For tax purposes, however, the Treasury Department and the Internal Revenue Service (IRS) enforce the Foreign Account Tax Compliance Act (FATCA), which mandates reporting by U.S. taxpayers of financial assets held outside of the United States. Currently, only individuals must report their foreign financial assets; this requirement may soon extend to certain U.S. domestic entities, including trusts.

Alien ownership of land

Q21 In the United States of America, foreign-controlled companies have the same rights as nationals or residents to own or lease land without a permit.

True			False	Can't say
✓				

Comment:

There are very few federal restrictions on the ownership of land by foreign individuals or by foreign corporations. The Secretary of the Interior requires American citizenship or a declared intention of citizenship for authorizing permits for grazing on public lands, and the Agricultural Foreign Investment Disclosure Act requires the disclosure to the Secretary of Agriculture by foreigners of agricultural land purchases in the United States.

Application of the law

Generally These indicators deal with the application of the law, as opposed to what the law actually says. They are bound to be generic and subjective, a matter of impression.

Q22 In the United States of America, the higher courts usually treat big businesses as fairly as they treat individuals and do not favour local interests over foreigners.

True			False	Can't say
✓				

Comment:

This is not generally a problem in the United States. Although the possible favouritism of every judge is impossible to account for in a survey such as this, US courts are not, as a rule, plagued by this sort of problem.

Costs and delays of commercial litigation

Q23 The costs and delays of commercial litigation in the higher courts in the United States of America are not considered materially greater than in other comparable countries.

True			False	Can't say
				✓

Comment:

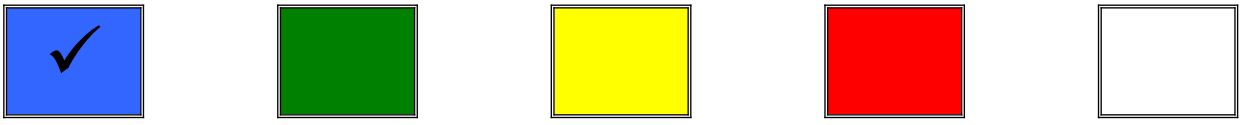
Not entirely applicable. The US is, of course, a developed country, and litigation is very costly and time consuming.

Overall ranking

This overall ranking is achieved by a survey of all the rankings as shown in this table:

	Question	Rating
1.	Insolvency set-off	
2.	Security interest	
3.	Universal trusts	
4.	Director liability for deepening insolvency	
5.	Financial assistance to buy own shares	
6.	Public takeover regime	
7.	Exclusion of contract formation	
8.	Termination clauses	
9.	Exclusion clauses	
10.	Governing law clauses	
11.	Foreign jurisdiction clauses	
12.	Arbitration recognition	
13.	Class action	
14.	Ownership of land	
15.	Security of land title and land registers	
16.	Land development restrictions	
17.	Employment law	
18.	Environmental restrictions	
19.	Foreign direct investment	
20.	Exchange controls	
21.	Alien ownership of land	
22.	Court treatment of foreign big business	
23.	Costs and delays of commercial litigation	Can’t Say

True **False** **Can't say**



Commentary and suggestions for change

An individual or company doing business in the United States will inevitably be faced with the different, and at times conflicting, laws of the several states as well as federal, or national, laws. In addition, they may be faced with different regulators at both the state and federal level, a confusion that is only enhanced by different state and federal court systems.

In many areas of corporate and transactional law, the laws of the different states have moved toward uniformity. In many cases, a push for more uniformity would seem to benefit market participants, especially those who seek to do business throughout the entire United States. However, a push for uniformity between the differing laws of the States is not without consequences.

The advantages of the many different legal systems in the United States resemble the advantages that generally arise from our federalist system. Most importantly, when each state can act on its own, the system allows for experimentation. Thus, in a sense, each state acts as a laboratory for experimentation. If successful, one state's example can be followed by others and even by the federal government. Different legal systems also encourage efficiency in government through competition: people and business will leave a state with difficult laws for another.

The disadvantages of the system are opposite sides of the same coin. Where, on the one hand, different systems allow experimentation, they may also lead to a "race to the bottom," whereby it may be difficult for one state to stake out a stricter law, even if desirable, because it may be undercut by competition from the other states.

The advantages and disadvantages of the United States' system, with its competing and contrasting legal systems among the states, are important to understand for domestic and international market participants alike.

Profiles

Peter Bruland graduated from Dickinson College with a Bachelor of Arts in Psychology. He is currently a second year student at Harvard Law School.

Michael Bleicher graduated from Brown University with a Bachelor of Arts in English. He is currently a second year student at Harvard Law School.

Ledina Gocaj graduated from Princeton University with a Bachelor of Arts from the Woodrow Wilson School of Public and International Affairs. She is currently a second year student at Harvard Law School.

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Profiles of faculty member involved

Professor Hal S. Scott[1]

Hal S. Scott is the Nomura Professor and Director of the Program on International Financial Systems (PIFS) at Harvard Law School, where he has taught since 1975. He teaches courses on Capital Markets Regulation, International Finance, and Securities Regulation. He has a B.A. from Princeton University (Woodrow Wilson School, 1965), an M.A. from Stanford University in Political Science (1967), and a J.D. from the University of Chicago Law School (1972). In 1974-1975, before joining Harvard, he clerked for Justice Byron White.

The Program on International Financial Systems, founded in 1986, engages in a variety of research projects. Its book, Capital Adequacy Beyond Basel (Oxford University Press 2004), examines capital adequacy rules for banks, insurance companies and securities firms. The Program also organizes the annual invitation-only U.S.-China, U.S.-Europe, U.S.-Japan, and U.S.-Latin America Symposia on Building the Financial System of the 21st Century, attended by financial system leaders in the concerned countries.

Professor Scott's books include the law school textbook International Finance: Transactions, Policy and Regulation (20th ed. Foundation Press 2014); International Finance: Law and Regulation (3rd ed. Sweet and Maxwell 2012) and The Global Financial Crisis (Foundation Press 2009).

Professor Scott is the Director of the Committee on Capital Markets Regulation, an independent, non-partisan research organization dedicated to enhancing the competitiveness of U.S. capital markets and ensuring the stability of the U.S. financial system. In May 2009, the Committee released a comprehensive report entitled The Global Financial Crisis: A Plan for Regulatory Reform.

Professor Scott is also Co-Chair of the Council on Global Financial Regulation, an independent director of Lazard, Ltd., a member of the Bretton Woods Committee, a past President of the International Academy of Consumer and Commercial Law and a past Governor of the American Stock Exchange (2002-2005).

[1] Professor Hal Scott's profile is sourced from Harvard Law School's website: http://hls.harvard.edu/faculty/directory/10781/Scott

Allen & Overy Global Law Intelligence Unit

The Allen & Overy Global Law Intelligence Unit is part of the international firm of Allen & Overy and produces papers, surveys and other works on cross-border and international law within the field of its practice. Allen & Overy is one of the largest legal practices in the world with approximately 5,000 people, including some 512 partners, working in 40 offices worldwide. For further information, please contact Philip Wood, philip.wood@allenovery.com or Melissa Hunt, melissa.hunt@allenovery.com.

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Philip Wood is one of the world's leading comparative lawyers and practitioners. He has written about 18 books on financial law. He was formerly a partner and head of the banking department of Allen & Overy. For many years he has been developing innovative and pioneering methodologies for assessing legal jurisdictions and has produced a book of maps of world financial law. His university textbook on the Law and Practice of International Finance has been translated into Chinese and a Japanese version is forthcoming.

Melissa Hunt is project director of the Intelligence Unit and is responsible for the management of the project. She carries out other work for the Intelligence Unit, including the preparation of tables covering rule of law and legal infrastructure risks in the jurisdictions of the world.

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